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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 629

ABE A. ROTWEIN,
Petitioner,

vs.

KOHLMEYER & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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KOHLMEYER & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Abe A. Rotwein, hereinafter referred to as Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi rendered on May 23, 1966.

The Respondent is Kohlmeyer & Company, a partnership, hereinafter referred to as Respondent.

A.

OPINIONS BELOW

The opinion of the Circuit Court of the First Judicial District of Hinds County, Mississippi, Russell Moore, Judge, was rendered on September 9, 1964, annexed as Appendix "A", and is unreported.

The opinion of the Supreme Court of Mississippi was rendered on May 23, 1966, annexed as Appendix "B", and is unreported officially, but appears *Kohlmeyer & Company* v. *Rotwein*, 186 So. 2d 768.

The judgments of the Supreme Court of Mississippi were rendered on May 23, 1966, June 13, 1966, and July 8, 1966, Appendix "C-1", "C-2", and "C-3" hereto, unreported.

The Motion and Suggestion of Error were overruled on July 8, 1966, without opinion.

B.

JURISDICTIONAL GROUNDS

The judgment of the Circuit Court of First Judicial District of Hinds County, Mississippi, was entered on September 15, 1964, Appendix "D" hereto.

The judgment of the Supreme Court was rendered on May 23, 1966, and amended on June 13, 1966.

The Motion and Suggestion of Error were overruled on July 8, 1966.

Jurisdiction to review by certiorari is conferred upon this Court by Section 1257(3) and Section 2101(c), 28 *U.S.C.*, Appendix "E" hereto.

C.

QUESTIONS PRESENTED

I. Where principal and broker contract that the laws of New York shall govern their futures contract, and their intent not to make delivery makes their transaction an unlawful wager under the laws of New York, and their contract is executed on an exchange in New York, are not the Commerce Clause, the Full Faith and Credit Clause, the Fifth Amendment and the Fourteenth Amendment, *United States Constitution*, violated by Section 26, *Recompiled Mississippi Code of 1942*, assuming to purge in Mississippi the New York contract of its illegality under the New York law by declaring that execution upon an exchange per se transforms that which was illegal into that which is legal?

II. When these wagering contracts were lawfully sitused in New York, where the broker's recovery was barred by the criminal law, was not the broker's recovery in Mississippi through Section 26, *Recompiled Mississippi Code of 1942*, a violation of the Commerce Clause, the Full Faith and Credit Clause, the Fifth Amendment and the Fourteenth Amendment, *United States Constitution*?

D.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

I. The *United States Constitution*, Appendix "F":

(a) The Commerce Clause, Article I, Section 8, Cl. 3.

(b) The Full Faith and Credit Clause, Article IV, Section 1.

(c) The Fifth Amendment.

(d) The Fourteenth Amendment.

II. *Mississippi Constitution and statutes*, Appendix "G":

(a) Section 33, *Mississippi Constitution.*

(b) Section 26, *Recompiled Mississippi Code of 1942.*

III. New York statutes, Appendix "H":

(a) Sections 991, 992, Penal Law, *McKinney's Consolidated Laws of New York, Annotated,* as to gambling.

(b) Sections 1370-1386, Penal Law, *McKinney's Consolidated Laws of New York, Annotated,* as to lotteries.

E.

STATEMENT OF THE CASE

We adopt the statement of the case made by the Supreme Court of Mississippi thus, *Kohlmeyer* v. *Rotwein,* 186 So. 2d 768, 769:

> "This is an appeal from the First Circuit Court District of Hinds County, Mississippi, wherein a judgment was denied both litigants in a suit filed by Kohlmeyer & Company for $6,975.75 claimed as a deficiency owing after the liquidation of Rotwein's account. Rotwein denied liability and sought to recover the sum of $7,797 of which amount $2,500 represented margin deposits made by him and $5,297 represented profits allegedly lost by him as a result of Kohlmeyer's alleged violation of its fiduciary relationship. The cause was heard by Judge Russell Moore, a jury having been waived.
>
> "The basic facts essential to the disposition of this appeal are briefly as follows: Kohlmeyer & Company, appellant, is a brokerage firm engaged in the business of buying and selling stock and commodities for the account of its customers. On April 16, 1963, Rotwein, appellee, executed a written instrument au-

thorizing appellant to act as his broker or agent in the purchase and sale of contracts for the future delivery of commodities."

Both Petitioner and Respondent were *particeps criminis* under future wagering contracts because, under the controlling law of New York, neither intended delivery as found by the trial judge (who was affirmed on appeal as to this point). But for the passage of the amendment to Section 26, *Recompiled Mississippi Code of 1942*, the Supreme Court would have affirmed the non-liability of Petitioner.

F.

FEDERAL QUESTIONS, HOW AND WHEN RAISED

In the amended answer of Petitioner it is averred (R. 87):

> "* * * Said Section 26, as amended, would violate the 14th Amendment to the United States Constitution, as imposing an improper, unreasonable and arbitrary regulation of wagering, allowing some to so do and denying the right to others, * * *."

In the opinion of the Circuit Court, Judge Moore declared (R. 621):

> "1) The Court is of the opinion that the Legislature, by providing that such contracts would be valid when made in accordance with the rules of any Board or Trade Exchange or similar institutions, is an unlawful delegation of the powers of the Legislature."

Judge Moore held that there was an unlawful wagering contract and rendered judgment for Petitioner, but upon appeal, the Supreme Court specifically reversed and imposed liability upon Petitioner, denying expressly the

immunity claimed under the Fourteenth Amendment. Such imposition, with deference, contravened the Commerce Clause, the Full Faith and Credit Clause, the Fifth Amendment and the Fourteenth Amendment, *United States Constitution.* When these constitutional rights existed, Petitioner specifically invoked the Fourteenth Amendment under *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1174. The Supreme Court specifically refused to acknowledge the supremacy of the *United States Constitution* thus brought to its attention, the Court thereasto saying, *Kohlmeyer* v. *Rotwein*, 186 So. 2d 768, 773:

> "As is true in many cases, we are unable here to arbitrarily set at rest the sundry issues and implications which are ably urged in briefs of counsel. Insofar as the basic issues presented in this case are concerned, we are led to the inescapable conclusion that the legislature properly exercised its prerogative and the constitutional rights of the litigants here have not been violated. * * *."

The Supreme Court overruled Petitioner's motion bringing these questions to its attention. See Appendix "I" hereto.

REASONS FOR ALLOWANCE OF THE WRIT

In *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L.ed. 2d 562; *United States* v. *Grace*, ... U.S. ....., 16 L.ed. 2d 662; and *Pennsylvania Railroad Co.* v. *United States*, 363 U.S. 202, 4 L.ed. 2d 1165, this Court outlined the practice where the Federal questions were serious and had to be bottomed upon a State or administrative commission ruling and held that certiorari could be granted until the court *a quo* had definitely determined the State law so that this Court might intelligently admeasure under the Constitution. Herein Mississippi's

Court has jumped all such questions and they are essential for a proper determination.

On the merits, it is, with deference, submitted that the Supreme Court herein specifically refused to predicate the judgment for Respondent upon the law of the State of New York, where both parties had contracted the determination should be; and, in addition, the contract upon which recovery was allowed was wholly performed in the State of New York whereasto the State of Mississippi had no jurisdiction.

Herein under the Full Faith and Credit Clause, the State of Mississippi under Section 26, *Recompiled Mississippi Code of 1942*, was without authority to deny the statutes of New York and its decisions the same faith and credit as they had in the State of New York and the decisions of this Court were abrogated completely.

Herein Mississippi assumed to legislate as to all commerce, foreign, interstate and local, and thereasto had no constitutional right thus to usurp the functions of the United States and of the State of New York.

There was a direct contravention of the Fifth and Fourteenth Amendments, *United States Constitution*, by that adjudged and the decisions of this Court were abrogated completely.

To epitomize, the Supreme Court of Mississippi has refused to decide questions requisite for constitutional determination of rights and has refused to follow the decisions of this Court to the disherison of Petitioner. This Court must not allow Mississippi to usurp the authority of the United States and of the State of New York. Preservation of such prerogatives is exclusively vested here.

ARGUMENT

POINT I

Where Principal and Broker Contract That the Laws of New York Shall Govern Their Futures Contract, and Their Intent Not to Make Delivery Makes Their Transaction an Unlawful Wager under the Laws of New York, and Their Contract Is Executed on an Exchange in New York, Are Not the Commerce Clause, the Full Faith and Credit Clause, the Fifth Amendment and the Fourteenth Amendment, United States Constitution, Violated by Section 26, Recompiled Mississippi Code of 1942, Assuming to Purge in Mississippi the New York Contract of Its Illegality under the New York Law by Declaring That Execution upon an Exchange Per Se Transforms That Which Was Illegal into That Which Is Legal?

Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1174, controls. Herein the contract between Petitioner and Respondent specifically provided that "its construction and enforcement shall be governed by the laws of the State of New York". Respondent having annexed to and made part of his Declaration as Exhibit "A" the contract, under Mississippi law, if there be a conflict between the Declaration and the contract, the Declaration is controlled by the contract as to the conflict. Compare *Montgomery* v. *Hanover National Bank*, 79 Miss. 443, 30 So. 635. Said contract is annexed hereto as Appendix One.

This right thus to contract between Rotwein and Kohlmeyer was constitutionally protected as to terms and parties and likewise as to what laws would govern. See 15 *C.J.S.*, "Conflict of Laws", Section 11, page 893; 16 *Am. Jur. 2d*, "Conflict of Laws", Section 46; and in *Uniform Commercial Code* (*U.L.A.*), Sec. 1-105, p. 15, it is said:

"(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. * * *."

Citing *Seeman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 71 L.ed. 1123.

The Circuit Court specifically found (R. 620):

"The Court further finds, as a matter of fact, that the parties hereto did not intend nor contemplate the delivery of sugar pursuant to any one of the three contracts, each contract, respectively, calling for delivery of one hundred and twelve thousand (112,000) pounds of sugar.

* * *

"Based upon the above and foregoing findings of facts and rulings of law and in light of the Court's ruling that Section 26 of the Mississippi Code of 1942, as amended, is unconstitutional, it necessarily follows that said contracts are unenforceable by either party. * * *"

Thereafter, on appeal, the Supreme Court, holding that any person might conform to Section 26, held the contract valid and imposed liability upon Petitioner for indemnity under the New York execution. Compare *United States* v. *New York Coffee & Sugar Exchange*, 263 U.S. 611, 68 L.ed. 475, wherein this Court reviewed the procedure on this exchange and awarded validity in virtue of the requirement that there be no "wash" sales; whereas the intention of the parties here as to nondelivery made same essential. Approved in *Corn Products Ref. Co.* v. *Commissioner*, 350 U.S. 46, 49, 50, 100 L.ed. 29, 34.

The Supreme Court, in order to vacate that done by the Circuit Court and make valid Section 26, had to consider and determine that said section did not violate (1) the Commerce Clause, (2) the Full Faith and Credit Clause, (3) the Fifth Amendment, and (4) the Fourteenth Amendment, *United States Constitution.* It based its judgment upon Section 26 which specifically declared that notwithstanding it was to be a wagering contract without delivery, the broker thus bound could cause an exchange execution to be had and when he so thus did, that which precedently was illegal, under both New York and Mississippi law, became legal under this remarkable statute. Section 26, prior to amendment, referred to "United States Cotton Futures Act" but when the amendment of 1956 occurred, the reference was to "United States Internal Revenue Code of 1954, subchapter D" insofar as it covered cotton; but did this limitation to cotton alone change the Federal imposition when the transactions in sugar were essentially similar?

Herein, with Kohlmeyer thus bound, it sought execution upon the Produce Exchange, though a member thereof, through Hirsch & Company by whom the sale was assumed to be offset. Note that under *Dickson* v. *Uhlman Grain Co.*, 288 U.S. 188, 77 L.ed. 691, there were normally four parties to this transaction, but here we have five. That assumed to be done by Mississippi's legislature and validated by its Supreme Court, was, where there was an exchange clearance, to make legal that which was illegal by purging from the contract the intention of the parties as to delivery. With deference, that thus so casually assumed, we question constitutionally.

The Circuit Court and, impliedly, the Supreme Court of Mississippi have found as to these futures contracts that there was an intent unlawfully to wager. When two

courts have passed on the facts, this Court seldom reviews. *Corn Products Ref. Co.* v. *Commissioner,* 350 U.S. 46, 100 L.ed. 29.

After the landmark case of *Irwin* v. *Williar,* 110 U.S. 499, 28 L.ed. 225, the question as to the right of one similarly circumstanced to Respondent was presented to this Court in *Embrey* v. *Jemison,* 131 U.S. 336, 33 L.ed. 172, and under the law, both of Virginia and New York, this Court specifically declared, 131 U.S. 344, 33 L.ed. 175:

> "* * * Mr. Benjamin, in his Treatise on Sales (Vol. 2, 6th Am. Ed. by Corbin, p. 716, Sec. 828), after stating that at common law wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited, says: 'It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them.' 'But such a contract', he proceeds to say, 'is only valid where the parties really intend and agree that the goods are to be delivered to the seller, and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute.' The statute referred to by the author is that of 8 and 9 Vic. chap. 109, Sec. 18, which provides 'that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or

which should have been deposited in the hands of any person, to abide the event on which any wager should have been made.

* * *

"We are of opinion that the special plea of wager presented a good defense to the action, and ought not to have been rejected; also, that the instruction asked by the defendant should have been given."

This case is likewise a landmark. The cases in this Court bearing on this are: *Dickson* v. *Uhlman Grain Co.*, 288 U.S. 188, 77 L.ed. 691; *Clews* v. *Jamison*, 182 U.S. 461, 45 L.ed. 1183; *Irwin* v. *Williar*, 110 U.S. 499, 28 L.ed. 225; *Bibb* v. *Allen*, 149 U.S. 481, 37 L.ed. 819. Basically being interstate commerce, the rulings of this Court ought to be paramount.

We make no attack upon *Chicago Board of Trade* v. *Christie G. & S. Co.*, 198 U.S. 236, 49 L.ed. 1031. See also *United States* v. *New York Coffee & Sugar Exchange*, 263 U.S. 611, 68 L.ed. 475. A broker who profits directly as a *particeps criminis* has never been allowed to recover and that is the law in this Court until this day.

Note Mississippi's statute, Section 26, *Recompiled Mississippi Code of 1942*. It applies to:

"All contracts of sale for future delivery of cotton, grain, stock, or other commodities (1) made in accordance with the rules of any board of trade, exchange or similar institution where such contracts of sale are executed; and (2) actually executed on the floor of such board of trade, exchange or similar institutions and performed or discharged according to the rules thereof; and (3) when such contracts of sale are made with or through a regular member in good standing of a cotton exchange, grain exchange or similar institution organized under the laws of the State of Mis-

> sissippi or any other state shall be, and they are hereby declared to be, valid and enforceable in the courts of this state according to their terms. * * *."

Note *Dickson* v. *Uhlman*, 288 U.S. 188, 77 L.ed. 691, where this Court considered the paramount power of Congress over the Commerce Clause as to commodities. As to these interstate transactions occurring on exchanges outside of Mississippi, thereover Mississippi's Legislature was without power to proscribe insofar as both interstate and foreign commerce were concerned. In *Head* v. *Board of Examiners*, 374 U.S. 424, 429, 10 L.ed. 2d 983, 988, this Court said:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act. '(T)he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.' California v. Zook, 336 U.S. 725, 731, 93 L.ed. 1005, 1010, 69 S. Ct. 841. * * *."

Let it be noted that when answering Interrogatory No. 13 (R. 25), Respondent specifically said:

> "13. (f) No commodity was to be kept. Defendant bought options to take delivery of sugar f.o.b. Caribbean ports in July and September, 1963, all pursuant to the terms and conditions and rules and by-laws of the New York Coffee and Sugar Exchange, Inc., on which exchange his orders were executed."

As to such a delivery (conceding there was to be one, which we do not) the relationship was extra-Mississippi and that at issue thus is, may this contract thus calling for delivery in a Caribbean port have integrated into it the statute to the extent that the agreement of the parties thereasto solemnly entered into was vacated? Mississippi had no power to take away from the parties their intentions as to non-delivery—a crime.

Section 26 is unique—sui generis. Note that Mississippi's Court under this section had held that these wagering contracts were unlawful, but the Legislature in 1956 then added the provision that the intention of the parties that there should be no delivery was eliminated by the proviso that, notwithstanding such intention to deliver was non-existent, the contract was valid—even though the parties intended New York law to control. The addition of this proviso thus controverting that which was held to be initially invalid was beyond the power of the Legislature, in that the Legislature could not declare the intention not to deliver should be eliminated. Where there are *particeps criminis,* criminality may not be purged by a declaration that criminal intent was absent. Such intent is that which not even the State may delete from a criminal act. The parties have a constitutional right to contract which this Court must protect when lawfully exercised.

Note that Rotwein as a party intended no delivery in his contract with Kohlmeyer. Mississippi's Court sustained Section 26 because Kohlmeyer, thus bound to Rotwein, assumed a further contract upon the exchange demanding immunity from the obligation not to require delivery. Mississippi's Court has animadverted this conduct on the part of Kohlmeyer having an obligation not to deliver to Rotwein and to deliver to the party with whom the transaction was made. Kohlmeyer cannot be two persons adversely in-

terested simultaneously. As was said in *Wildberger* v. *Hartford Fire Ins. Co.*, 72 Miss. 338, 344, 17 So. 282:

> "* * * It would require a faculty for judicial analysis which could
>
> . . . sever and divide
>
> A hair twixt north and northwest side—
>
> a casuistry too refined and sublimated for the practical affairs of business life, to find in a doctrine that would uphold such a contract, a rule of action safe for common sense dealing. * * *."

There Wildberger, as an individual, sought to make through himself as agent for an insurance company a contract of indemnity. Mississippi's law forbade.

In other words, herein, the understanding of the parties that it should be a wager is to be eliminated by substituting for that thus understood the "rules of any board of trade, * * * where such contracts of sale are executed"; and the contract shall be "valid and enforceable" by virtue of the dual personality of Kohlmeyer. The Supreme Court of Mississippi commented, *Kohlmeyer* v. *Rotwein*, 186 So. 2d 768, 772:

> "* * * The legislature had an opportunity to examine the rules and procedures of the various exchanges and the extent of regulation, and it could have exempted, and can exempt in the future, any exchange which it feels is not being properly regulated or has adopted arbitrary rules. We hold that the legislature did not make an unlawful delegation of legislative process by simply providing that contracts made on exchanges, which it evidently feels are being properly regulated, are enforceable. * * *."

Regulations are one thing; performance by parties is basically another. The Legislature had no investigation made whatsoever, as we are advised, as to foreign ex-

changes and is at now wholly ignorant thereasto; but if it had, it would have found that they required delivery on futures sales just as the record shows as to the Produce Exchange. Mississippi may not pretend to borrow from these other states these regulations as to exchanges and, after having so borrowed from abroad, substitute in the State of Mississippi a nullifying clause eliminating the intention of the parties. The Legislature could not write into the contract other than what the parties intended. The Courts in this State have appropriately refused to make contracts. *Singer* v. *Tatum,* 251 Miss. 661, 171 So. 2d 134; *Bradley* v. *Howell,* 161 Miss. 346, 134 So. 843.

When Rotwein and Kohlmeyer contracted, they specifically had certain obligations and the law is subject to the maxim "Modus et conventio vincunt legem", *Broom's Legal Maxims,* p. 689.

The obligation rests upon this Court to determine what this contract is and what is requisite for the parties thereunder to do. Compare *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U.S. 453, 50 L.ed. 1102. This is a most remarkable case. The civil liability sought to be asserted is predicated upon the criminal law against gaming. As was said by Mississippi's Court in *Alamaris* v. *Jno. F. Clark & Co.,* 166 Miss. 122, 145 So. 893, 894:

> "* * * The established public policy in this state and the strong public sentiment against transactions and contracts such as has above been mentioned has received perhaps its most vivid and forceful expression in Ascher & Baxter v. Edward Moyse & Co., supra (101 Miss. 36, 57 So. 299), wherein it was said that 'dealing in futures is the begetter of poverty, the companion of embezzlement, the associate of degradation, and it scourges every one whom it touches.' "

Note *Capps* v. *Postal-Telegraph Co.*, 197 Miss. 118, 19 So. 2d 491, holding hedging unlawful.

Until 1956 in Mississippi and in New York, Kohlmeyer had no right of recovery. Mississippi went further than most States. Mississippi's Court condemned futures contracts irrespective of their origin, *Capps* v. *Postal-Telegraph Co.*, 197 Miss. 118, 19 So. 2d 491.

With deference, the surrounding circumstances in this record are not as clear as we might hope, for there was the execution of these contracts upon the exchange not by Kohlmeyer but by Hirsch & Company. In *Brooks* v. *Peoples Bank*, 233 N.Y. 87, 134 N.E. 846, 849, that Court said:

> "* * * The law of this state is given in Weld v. Postal Telegraph-Cable Co., 199 N.Y. 88, 92 N.E. 415, as follows:
>
> "'A man may lawfully sell goods or stocks for future delivery, even though he has none in his possession, if he really intends and agreed to deliver them at the appointed time. Such a transaction constitutes a valid contract, which is enforcible in the courts. But a man may not, under the guise of such a contract, enter into a market speculation upon the rise or fall of prices, in which there is to be no delivery of property, and no payment except such as may be necessary to provide for differences arising purely from market fluctuations. Such a transaction is a mere wager, which is condemned alike by statute and public policy.'"

Note also *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y. 2d 9, 203 N.E. 2d 210; *Hurd* v. *Taylor*, 181 N.Y. 231, 73 N.E. 977, affirmed 87 N.Y.S. 1137; *In re Estate of Morman P. Dana*, 135 N.Y.S. 2d 522; *Bamman* v. *Erickson*, 288 N.Y. 133, 41 N.E. 2d 920, 141 A.L.R. 938, wherein Rotwein is likened unto the fly and Kohlmeyer unto the spider.

In 1956, the Legislature, through Chapter 229, *Mississippi Laws of 1956*, amended Chapter 304, *Mississippi Laws of 1928*, as precedently adjudicated, and added at the close of Section 26, *Recompiled Mississippi Code of 1942*, the following:

> "* * * provided, further, that if contracts of sale for future delivery of cotton, grain, stock, or other commodity shall conform to all of the requirements set forth above in this section, then the same shall be valid and enforceable in all the courts of this state, notwithstanding that at the time of execution of such contracts that either or both of the parties thereto did not contemplate or intend that the same should be consummated by the actual delivery and receipt of the commodity specified. The plain intent of this section, while declaring unlawful all transactions conducted in and through a 'bucket shop' as hereinafter defined, is to make lawful and enforceable and to withdraw from the provisions of the gaming and wagering laws, all transactions executed upon and in accordance with the rules of a legitimate cotton, grain, stock or other commodity exchange or board of trade *whether the intent of delivery of the actual commodity was present or not and this article shall be liberally construed at all times so as to effectuate this purpose.*" (Italics ours.)

This act also substituted "United States Internal Revenue Code of 1954, subchapter D" for "United States cotton futures act, approved August 11th, 1916". It will also be noted that Sections 28 and 31, *Recompiled Mississippi Code of 1942*, were not amended.

Mississippi's Court held Section 26, as amended, constitutional when, with deference, the most remarkable results could follow. Herein both the Circuit Court and the Supreme Court have held, in effect, that Kohlmeyer is guilty of a felony as defined in Section 31, *Recompiled Mississippi Code of 1942*, for the sole effect of this amendment

was not to abrogate the crime but simply to make the contract valid when thereinto had to be integrated all of the rules prescribed. The Court assigned as the basis of its holding Section 26 constitutional the following, *Kohlmeyer* v. *Rotwein*, 186 So. 2d 768, 772:

> "Appellee contends that section 26 is class legislation, and violates due process of law in that the legislature has made an arbitrary distinction between brokerage houses in this state which have connections with an exchange, and those which do not. We do not agree for the reason that any brokerage house that can qualify may obtain the benefits which the legislature has seen fit to grant. In other words, any person or firm interested in dealing in commodities' futures may do so by complying with the legislative intent and requirements. In a proper case we could be concerned with the problems and practicalities of fulfilling the requirements of a statute, but we find no necessity for concern in this case. * * *."

With deference, we challenge the judgment of Mississippi's Court that in this case there is not the necessity of a decision which that Court declined to make.

This Court held in *Bond* v. *Hume*, 243 U.S. 15, 61 L.ed. 565, that a judgment rendered in New York was enforcible in Texas in the Federal Court notwithstanding the laws of that State. If the laws of New York authorized a judgment here, which it does not, that judgment would be coerced in Mississippi. *Fauntleroy* v. *Lum*, 210 U.S. 230, 52 L.ed. 1039; and a logical conclusion therefrom is that if this contract was to be performed in New York, made in New York, the losses suffered in New York, and the obligation to indemnify existent, if at all, under the laws of New York, the Supreme Court of Mississippi could not alter the statutes and decisions of New York without constitutional contravention.

POINT II.

When These Wagering Contracts Were Lawfully Sitused in New York, Where the Broker's Recovery Was Barred by the Criminal Law, Was Not the Broker's Recovery in Mississippi Through Section 26, Recompiled Mississippi Code of 1942, a Violation of the Commerce Clause, the Full Faith and Credit Clause, the Fifth Amendment and the Fourteenth Amendment, United States Constitution?

We refer to the New York decisions made supra and to the findings of facts made by both courts (assuming that the Supreme Court had passed on the facts as such): under the decisions of this Court, Mississippi's Court could not have rendered a judgment against Petitioner because the laws of New York and not Mississippi controlled.

We submit that our case of *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1174, is controlling. There, in time of affluence, the Delta & Pine Land Company moved its business office to Memphis where the contract of indemnity was applied for and issued. Thereupon, the panic having been, the Company returned to Mississippi where it was domiciled and where its plantation was located and all of its business was done. One of its employees there defrauded. Under the Tennessee law, after fifteen months, the action was barred. Under the law of Mississippi, it was not. The Supreme Court of this State having rendered judgment for our client, the insurance company appealed and therein this Court unanimously held that the contract, being a Tennessee contract (however relating solely to matters in Mississippi) could not, under the Constitution, be changed by Mississippi law; and that although the defalcation was in Mississippi and all of the business of the company was in Mississippi (with only an office in

Memphis), the Legislature of Mississippi was impotent to vouchsafe protection against the default. This case follows *Hooper* v. *California*, 155 U.S. 648, 39 L.ed. 297; *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 43 L.ed. 552; *New York L. Ins. Co.* v. *Cravens*, 178 U.S. 389, 44 L.ed. 1116; *New York L. Ins. Co.* v. *Head*, 234 U.S. 149, 58 L.ed. 1259; *Aetna L. Ins. Co.* v. *Dunken*, 266 U.S. 389, 69 L.ed. 342; *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 74 L.ed. 926.

The subsequent history of this case is such, with deference, as that its principle is controlling:

(1) *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66, 99 L.ed 74, concurring opinion of Mr. Justice Frankfurter, 348 U.S. 74, 76, 99 L.ed. 83, 84, approving the *Delta & Pine Land Company Case*.

(2) *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 210, 4 L.ed 2d 1170, 1175:

> "* * * In Hartford Acci. & Indemn. Co. v. Delta & Pine Land Co., 292 U.S. 143, 78 L.ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, the Court held that Mississippi could not constitutionally apply its own law to invalidate a contract clause limiting the insurer's liability on a surety bond against defalcations by the insured's employees 'in any position, anywhere,' to losses of which notice was given within fifteen months after the termination of coverage. The contract was made in Tennessee where the insured had offices and the insurer was licensed to do business. Mississippi's action was struck down although the contract covered an ambulatory risk, the default giving rise to the claim actually occurred in Mississippi, the insurer was under license doing business there, and the insured was incorporated there."

Mr. Justice Black, with whom the Chief Justice and Mr. Justice Douglas joined, dissented, but therein said, 363 U.S. 220, 4 L.ed. 2d 1180:

"* * * The only philosophy on which the Dick and Delta & Pine Land Co. Cases could be made to apply here would be on the old idea that the law of the place where the contract is made always governs every activity under it, a rule that had been repudiated by courts and commentators everywhere, especially as a constitutional rule."

(3) *Richards* v. *United States*, 369 U.S. 1, 15, 7 L.ed. 2d 492, 501:

"Our view of a State's power to adopt and appropriate conflict-of-laws doctrine in a situation touching more than one place has been indicated by our discussion in Part III of this opinion.[31] Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of Missouri, the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation. * * *."

Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1178, is cited in Footnote 31.

Our submission is that Mississippi was powerless to impose her laws upon the contract made and performed in New York, especially because of the interstate commerce whereasto this contract was made.

See also *National Equipment Rental* v. *Szukhent*, 375 U.S. 311, 320, 11 L.ed. 2d 354, 360, wherein this Court said:

"No federal statute has undertaken to regulate the sort of agency transaction here involved. There is only Rule 4(d)(1), which says nothing more than that in federal courts personal jurisdiction may be ob-

> tained by service on an 'agent'. The Rule does not attempt to define who is an 'agent.' To me it is evident that the draftsmen of the Rules did not, by using the word 'agent,' show any intention of throwing out the traditional body of state law and creating a new and different federal doctrine in this branch of the law of agency. Therefore, it is to the law of New York—the State where this action was brought in federal court, the place where the contract was deemed by the parties to have been made, and the State the law of which was specified as determining rights and liabilities under the contract—that we should turn to test the validity of the appointment."

See also *Texas* v. *New Jersey*, 379 U.S. 674, 678, 13 L.ed.2d 596, 599.

We repeat that the law of this Court, of Mississippi before the enactment of the amendment, and continuously the law of New York has been without variation that where there was *particeps criminis* relationship and where, as here, with deference, Rotwein was taken for a cleaning the right to be protected in accordance with the law of the State of New York is crystal clear. The performance in New York vouchsafed to him that which was accorded to him by the learned Circuit Judge when, with deference, he held that this particular statute was beyond the power of the State of Mississippi to adopt. We are cognizant that it is sometimes possible to delegate certain powers but, with deference, the delegation here has not been, until this decision, in accordance with the laws of Mississippi. *Alcorn* v. *Hamer*, 38 Miss. 652, 751, applying *Barto* v. *Himrod*, 4 Selden 486. See, however, *State* v. *Wood*, ... Miss. ....., 187 So. 2d 820.

When Section 26 placed action upon an exchange when there was no exchange within the State of Mississippi or subject to the police power of the State of Mississippi, and

made this personal act destructive of the rights of the State of New York as to its police power and of the United States under the Fourteenth Amendment, it is imperative that rectification shall be hereasto had. Let it be carefully noted that the State of New York, whose police power is thus controlling as to that done, has not enacted any law comparable to the Mississippi statute. The importance of this decision is that the exchanges, cognizant of the law since *Irwin* v. *Williar*, 110 U.S. 499, 28 L.ed. 225, have sought successfully in certain States to weaken that which, as this Court said in *Stone* v. *Mississippi*, 101 U.S. 814, 25 L.ed. 1079, so basically debilitates. Learned counsel for respondent in their brief in the Supreme Court said, Br. p. 24:

> "At least ten other states have adopted the same pattern of classification found in the original enactment in 1928 of Section 26 of the Code. Five of these states have statutes that are almost verbatim the same, differing in substance only as to requirements in Georgia, South Carolina and Texas that the parties must contemplate actual delivery. Statutes in the remaining five states. although not verbatim the same as Section 26 of the Code, nevertheless adopt the same pattern of distinction between a bucket shop and transactions on a recognized exchange."

The States so thus claimed to support Mississippi's decision are Arkansas, Georgia, Oklahoma, South Carolina, Texas, Florida, Massachusetts, Missouri, North Carolina and Tennessee. Counsel contends, therefore, with deference, that since these several States have adopted what he contends to be similar legislation, this Court should add its approval thereto by a decision sustaining that by Mississippi assumed to be done. We do not agree with counsel and insist that the law as announced by *Benjamin on Sales* (*Embrey* v. *Jemison*, 131 U.S. 336, 344, 33 L.ed. 172, 174) is controlling here.

We also place reliance upon the case of *Lum* v. *Fauntleroy*, 80 Miss. 757, 32 So. 290, and *Fauntleroy* v. *Lum*, 210 U.S. 230, 52 L.ed. 1039, where this Court, the statute of Mississippi to the contrary notwithstanding, specifically held, under the Full Faith and Credit Clause, that the laws of the State of Missouri were controlling. This doctrine is, with deference, efficacious in Mississippi in virtue of the decision having been approved in this Court. Its history here is in part: *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 438, 88 L.ed. 149, 154; *Union National Bank* v. *Lamb*, 337 U.S. 38, 41, 93 L.ed. 1190, 1194; and *Hughes* v. *Fetter*, 341 U.S. 609, 614, 615, 95 L.ed. 1212, 1217, 1218, Mr. Justice Frankfurter, with whom Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Minton joined, dissented.

We refer to the New York decisions quoted and relied upon supra. The New York statutes as to gambling are Sections 991, 992, Penal Law, *McKinney's Consolidated Laws of New York, Annotated;* and the lottery statutes are Sections 1370-1386, Penal Law, *McKinney's Consolidated Laws of New York, Annotated.*

CONCLUSION

We reiterate that the facts have been found against the Respondent. Thereasto there should be no review until further elucidation has been had.. Remember that Respondent solicited Petitioner, furnished a trip to St. Louis free so that Petitioner might become conversant in one day with the world-wide commodity market. As soon as Petitioner returned, he ventured thereinto—which Respondent describes thus (R. 229):

"THE SPECULATOR

An important portion of the total commodity trading volume represents trading by speculators who have no direct connection with any commodity trade.

It is important to note that no commodity exchange or reputable commission house encourages uninformed public speculation. The modern commodity trader is, for the most part, very well-informed and a keen student of markets. He may well be considered as akin to any experienced, resourceful business man. His business is to analyze all price making factors. He buys when he thinks prices are too low and he sells when he thinks prices are too high. In addition to foresight he must have courage and resources, and *know how to limit his losses when his judgment is wrong.* (Emphasis supplied.)

He performs an important economic function because his continuous trading, interest and activity are necessary for really broad and continuous markets; and broad, active markets are necessary for effective hedging.

The speculator is, in effect, the risk bearer who assumes the risks which the hedger seeks to avoid. His function is, in a general way, similar to that of an insurance underwriter."

Kohlmeyer knew that Rotwein could not qualify. Rotwein had been assured that there would be no losses other than the margins, and yet when there had been a call for margins, they were jumped to $12,000 payable immediately when the entire judgment herein amounts only to $6,975.75.

Further, there was the question of a lottery by reason of the closure of the market. However, herein the Constitution, with deference, as construed by this Court heretofore, has been flagrantly disregarded by Mississippi's Supreme Court when it reversed a judgment for Petitioner on the ground that Section 26, as amended in 1956, was a constitutional exercise of Mississippi's sovereignty whereby an express contract that the laws of the State of New York should control was abrogated; the contract agreed to be made under the laws of New York was made in New

York, was performed in New York and the losses occurred in New York against which indemnity in Mississippi is sought to be set up under Section 26.

The law in New York was flagrantly disregarded. No other State, insofar as we can find, has ever had the temerity to pass an act whereunder the intention of the parties to the contract could be deleted and the contract construed under a law of a foreign sovereignty whose Legislature had no jurisdiction over that done in manner and form as done in New York. Seldom has a case involving such momentous principles been presented here—that the intention of the parties to a contract should be controlled by a fiat of the State Legislature referring to the rules of an exchange in a foreign State. If the symmetry of the law is to be maintained, that which was asserted in *Irwin* v. *Williar*, 110 U.S. 499, 28 L.ed. 225, and the cases following it, must be again made effective under the duty imposed by the Constitution upon this Court. The public interest demands it.

The original record in the Supreme Court of Mississippi is being sent to this Court for verification of statements and so that, if certiorari is granted, appropriate printing may be had.

Petitioner prays that if certiorari be not appropriate, then that an appeal might be allowed on these papers.

Respectfully submitted,

ABE A. ROTWEIN
Deposit Guaranty Bank Building
Jackson, Mississippi

GARNER W. GREEN
800 Electric Building
Jackson, Mississippi
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Garner W. Green, one of the attorneys for the Petitioner herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Petition for a Writ of Certiorari on Respondent in the manner following:

1. By mailing 1 copy thereof in a duly addressed envelope, with postage prepaid, to John W. Grower, Esquire, Brunini, Everett, Grantham & Quin, First National Bank Building, Jackson, Mississippi 39201.

2. By mailing 1 copy thereof in a duly addressed envelope, with postage prepaid, to Lemle & Kelleher, National Bank of Commerce Building, New Orleans, Louisiana.

3. By mailing 1 copy thereof in a duly addressed envelope, postage prepaid, to Wells, Thomas & Wells, Lamar Life Building, Jackson, Mississippi, attorneys for amicus curiae.

I further certify that I have caused to be mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D.C. 20530.

This the ____ day of _____, 1966.

.....

GARNER W. GREEN
800 Electric Building
Jackson, Mississippi 39201
One of the Attorneys for Petitioner

APPENDIX ONE

Commodity Account Agreement

ABE A. ROTWEIN — 80-714547

Name — Account No.

TO: KOHLMEYER & COMPANY

1. In consideration of your acting as broker for the undersigned in the purchase or sale of commodities (which term shall include contracts relating to immediate or future delivery of commodities), the undersigned agrees, in respect to all commodity accounts which the undersigned now has or may at any future time have with you or your successors (hereinafter referred to as "you"), including accounts from time to time closed and then reopened, as follows:

2. Orders for the purchase or sale of commodities shall be received and executed with the express intent that actual delivery is contemplated. All transactions shall be subject to the constitution, by-laws, rules, regulations, customs and usages of the exchange or market where executed (and of its clearing house, if any) and to the rules and regulations of all government agencies having jurisdiction in the premises.

3. If the undersigned should die or become incompetent, you are authorized, prior to knowledge thereof, to execute any pending order, and you are hereby indemnified against loss arising therefrom.

4. To secure any indebtedness or other obligation *owned* by the undersigned to you, you are hereby granted a lien on all of the undersigned's property at any time held by you. You may without notice transfer any money or

other property interchangeably between any accounts of the undersigned, except that any transfer from a commodity account which is subject to regulations under the Commodity Exchange Act to a different kind of account shall have such other authorization by the undersigned as shall be required by such regulations.

5. You may from time to time demand additional security or that any account be immediately liquidated or transferred and any debit balance paid to you in full. The undersigned agrees to pay promptly on demand any and all sums due to you for monies advanced, with interest at the current rate, and your charges for commissions at rates fixed by the regulations and usages of the exchange or market where orders are executed.

6. You shall have the right, whenever in your discretion you consider it necessary for your protection, or in the event that a petition in bankruptcy or for the appointment of a receiver is held by or against the undersigned, or in the event of the death of the undersigned, or in the event the undersigned is adjudged incompetent, to sell any or all commodities, securities, or other property in any account of the undersigned and to buy any or all commodities, or securities which may be short in any account of the undersigned, and to close out and liquidate any and all outstanding contracts of the undersigned, all without demand for margin or additional margin, notice of sale or purchase, notice or advertisement of any kind whatsoever, and any such sales or purchases may be made at your discretion on any exchange or other market where such business is then usually transacted, and on any such sale you may be the purchaser for your own account; it being understood that a prior demand, or call, or prior notice of the time and place of such sale or purchase, if any be given, shall not be con-

sidered a waiver of your right to sell or to buy without demand or notice as herein provided; and the undersigned shall at all times be liable to you for the payment of any debit balance owing in the accounts of the undersigned with you, and shall be liable for any deficiency remaining in any such account in the event of the liquidation thereof in whole or in part.

7. The undersigned will notify you immediately of any error appearing in any confirmation, purchase and sale statement, or statement of account. The undersigned, if an individual, hereby represents himself or herself to be 21 years of age or over.

8. This agreement shall be irrevocable as long as the undersigned shall have any account with you; it shall be binding upon the undersigned and upon the undersigned's executors, administrators, heirs and assigns; it can be amended only in writing duly signed by the undersigned and a member of your firm; its construction and enforcement shall be governed by the laws of the State of New York.

Signature /s/ Abe A. Rotwein

Dated, April 16, 1963
Witness:
/s/ James E. Allen

APPENDIX "A"

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

KOHLMEYER & COMPANY, Plaintiff,

vs.

ABE A. ROTWEIN, Defendant.

Cause No. 16,944

Opinion of the Court

This cause came on to be heard during the July, 1964, term of the Circuit Court of the First Judicial District of Hinds County, Mississippi, a jury having been waived; the matter was presented to the Court and taken under advice pending submission of briefs by the parties hereto.

This cause is brought by Kohlmeyer and Company against Abe A. Rotwein to recover certain sums of money allegedly due as a result of losses arising out of the purchase of certain sugar contracts.

Kohlmeyer and Company is a brokerage concern with offices in various states, including the State of Mississippi, and in the early part of 1963, the defendant began purchasing contracts in the commodity market through the plaintiff's Jackson, Mississippi, branch office.

On or about May 13, 1963, the defendant, through Kohlmeyer and Company, purchased one sugar contract at a price of 10.30 cents per pound; on May 20, 1963, the defendant purchased a second sugar contract at 11.40 cents per pound; on or about May 23, 1963, the defendant purchased a third sugar contract at a price of 12.98 cents per

pound. Subsequent thereto the sugar market began to decline. On May 26, 1963, the defendant left for California and did not talk to the plaintiff's agent, Jim Allen, until the said Jim Allen reached him by telephone on May 29, 1963, at which time plaintiff's agent advised the defendant that more margin was needed in order for him, the defendant, to remain in the market.

The defendant did not contact plaintiff's representative until the following Monday, at which time the defendant instructed the plaintiff's agent to sell his contracts. Due to the adverse market, plaintiff was unable to dispose of said contracts until June 10, 1963, at which time the contracts were liquidated at a loss of $6,975.75.

Kohlmeyer and Company has brought its claim for this amount and a cross claim had been filed by the defendant, Abe A. Rotwein, alleging that the plaintiff's agent, Jim Allen, breached certain duties allegedly owing to him, the defendant, by failing to sell said sugar contracts prior to the decline in the market, resulting in a loss to the defendant in the sum of $5,297.00.

After reviewing the evidence and testimony of the parties hereto, the Court is of the opinion that the plaintiff's agent, Jim Allen, violated no duty, nor did he breach any trust or fiduciary relationship which may have existed between he and the defendant.

The Court is of the opinion that Jim Allen, agent for Kohlmeyer and Company, did all within his power to prevent the defendant's losses; however, with the defendant being absent from the state, and not in contact with the said Jim Allen, it was impossible for him to take any affirmative action toward disposing of the defendant's sugar contracts.

Should he, Jim Allen, have disposed of these contracts without the consent of the defendant, and the sugar commodity market had increased rather than decreased, then it is certain that a cause of action would be maintainable for losses incurred as a result of the unauthorized sale; should the contracts be legal.

Therefore, the Court, as a matter of fact, finds that the defendant should not recover on his cross claim based upon the allegation of breach of the fiduciary relationship.

The Court further finds, as a matter of fact, that the parties hereto did not intend nor contemplate the delivery of sugar pursuant to any one of the three contracts, each contract, respectively, calling for delivery of one hundred and twelve thousand (112,000) pounds of sugar.

The defendant has raised the constitutionality of Section 26 of the Mississippi Code of 1942, as amended, and seeks to recover the sum of Two Thousand Five Hundred and No/100 ($2,500.00) Dollars, advanced as margin on these contracts.

The Court has reviewed thoroughly the briefs submitted by both, the plaintiff and the defendant, along with the Mississippi cases dealing on this question. Prior to the amendment, in 1956, of Section 26 of the Mississippi Code of 1942, as amended, the Supreme Court of our State consistently held that such contracts were void as falling within the provisions of our law dealing with gambling, and as against public policy.

Alamaris vs. John F. Clark & Co., 166 Miss. 122.

Laird, Bissell & Meeds vs. C. W. Capps, 80 So.2d 49.

It is apparent that the Legislature by amending Section 26 of the Mississippi Code of 1942, sought to nullify the statutory and case law of this State dealing with

"future contracts" under certain enumerated circumstances as set forth in said section. However, the Court is of the opinion that notwithstanding this attempt to circumvent prior decisions of the Supreme Court, the statute, as written, is unconstitutional for the following reasons:

1) The Court is of the opinion that the Legislature, by providing that such contracts would be valid when made in accordance with the rules of any Board of Trade Exchange or similar institutions, is an unlawful delegation of the powers of the Legislature.

The Court, in so finding, is not unmindful of the argument that in modern day times, that the Legislature has frequently established and authorized various Commissions and Boards within the State to assume certain legislative authority, yet, I am of the opinion that the delegation of such powers to a Board of Trade, Exchange, or similar institutions foreign to the boundaries of the State of Mississippi, and over whom the governing powers of the State of Mississippi have no control, is certainly an unwise, improper and unlawful delegation of legislative authority.

2) The Court is further of the opinion that said statute is in violation of the long established public policy of the State of Mississippi against gambling. Again, the Court is not unmindful of the arguments that such a statute, or such an exception should be made to allow such contracts to be made and enforceable, in order to expedite trade and commerce between the State of Mississippi and our sister states of the Union.

However, the Court is of the opinion that we cannot cast aside the principles and public policy of our State merely for expediency, for to do so in one instance would lead to other instances, and eventually a complete repudia-

tion of the public policy against gambling, to the detriment of our people.

Based upon the above and foregoing findings of facts and rulings of law and in light of the Court's ruling that Section 26 of the Mississippi Code of 1942, as amended, is unconstitutional, it necessarily follows that said contracts are unenforceable by either party. Therefore, the Court is of the opinion that the plaintiff, Kohlmeyer and Company, should recover nothing of the defendant, Abe A. Rotwein, and that the counter claim of the defendant, Abe A. Rotwein, is denied. (Isaacs vs. Silverberg, 39 So. 420.)

Court costs are hereby taxed to the plaintiff.

/s/ Russel D. Moore III
Russel D. Moore III
Circuit Judge

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

No. 43,963

KOHLMEYER & COMPANY

v.

ABE A. ROTWEIN

BRADY, JUSTICE:

This is an appeal from the First Circuit Court District of Hinds County, Mississippi, wherein a judgment was denied both litigants in a suit filed by Kohlmeyer & Company for $6,975.75 claimed as a deficiency owing after the liquidation of Rotwein's account. Rotwein denied liability and sought to recover the sum of $7,797, of which amount $2,500 represented margin deposits made by him and

$5,297 represented profits allegedly lost by him as a result of Kohlmeyer's alleged violation of its fiduciary relationship. The cause was heard by Judge Russell Moore, a jury having been waived.

The basic facts essential to the disposition of this appeal are briefly as follows: Kohlmeyer & Company, appellant, is a brokerage firm engaged in the business of buying and selling stock and commodities for the account of its customers. On April 16, 1963, Rotwein, appellee, executed a written instrument authorizing appellant to act as his broker or agent in the purchase and sale of contracts for the future delivery of commodities.

There is essentially little dispute as to the transactions made for appellee by appellant's manager, James Allen, or as to the manner in which the transactions were conducted. During the month of May 1963 appellee ordered Allen to purchase three contracts for the future delivery of sugar. These purchases were made by appellant through Hirsch & Company, acting as its agent, the last purchase having been made on May 23, 1963. While other commodity "futures contracts" had been bought and sold by appellant for appellee, the three sugar contracts are the only ones involved in this suit. Prior to, and during the course of the sugar contract transactions, appellee made margin deposits with appellant totaling $2,500. Subsequent to the last of these three purchases, the price of sugar began to decline sharply.

Appellee left for California on May 26, 1963, and appellant's manager, Allen, was unable to contact him until May 29. At that time Allen advised appellee that the sugar market was down and called upon appellee for additional security against loss, or margin deposits, as was authorized by the Commodity Account Agreement executed

by the appellee. On the following Monday, appellee ordered Allen to sell his contracts, but Allen was unable to dispose of them until June 10 due to the fact that the market was "down the limit," this being the maximum range of fluctuation permitted by the exchange rules.

Appellee testified that he had instructed Allen to sell the contracts if the market showed signs of weakness or decline and that Allen had breached his duty by failing to do so. Allen testified that he was unable to contact appellee for instructions, and that when he finally received appellee's instruction to sell the contracts he was unable to do so due to the fact that the market was "down the limit" and there were not enough offers to purchase. Appellee was called upon to make additional margin deposits and, having failed to do so, his account was liquidated pursuant to the Commodity Account Agreement. This liquidation resulted in a net loss of $6,975.75 to the appellant, and appellant instituted this suit to collect the deficiency.

The appellee denied liability on several grounds and charged that appellant had violated its fiduciary relationship in that it had not protected the appellee by following his instructions to sell if the market began to decline. Appellee sought recovery of the $2,500 in margin deposits made by him and $5,297 in profits allegedly lost by reason of this failure to follow his instructions. The trial court held that neither party was entitled to recovery, and both parties have appealed.

We discuss first those errors assigned by Rotwein, the appellee and cross-appellant, which warrant discussion. They are:

1. The trial court erred in failing to find that the transactions entered into were within the Mississippi Statute of Frauds.

2. The trial court erred in finding that the agent, manager of Kohlmeyer and Company, and acting as a fiduciary, did all he could to prevent the loss complained of by appellant, Kohlmeyer.

We find no merit in appellee's contention that the transactions entered into in this case are violative of the Mississippi Statute of Frauds requiring certain contracts to be in writing. Appellee executed a written contract which authorized the appellant brokerage firm to act as his agent in the purchase and sale of "futures contracts." He gave certain oral instructions to appellant, and the transactions pursuant to these instructions were completely executed by appellant as agent for appellee. The fact that the transactions were fully consummated takes the contract between the appellant agent and the clearing house out of the Statute of Frauds. Miss. Code of Annot. §268 (1956). The balance in the account is money advanced by and owing to appellant by the appellee under the written agreement.

We find no merit in appellee's contention that appellant violated its fiduciary relationship. The record indicates that the trial judge was accurate in his findings and the conclusion that there was no violation of the fiduciary relationship and no failure on the part of appellant's agent to be diligent in the performance of his brokerage duties.

The appellant has assigned the following two errors which merit discussion and analysis:

1. The trial court erred in holding that Mississippi Code Annotated section 26 (1956) provides an unconstitutional delegation of legislative powers.

2. The trial court erred in holding that said statute is in violation of the public policy of Mississippi against gambling.

We discuss the above assignments in reverse order.

It can be conceded that there would be merit in the appellee's claim, which is in conformance with the lower court's holding, that the transactions involved are in violation of the public policy of the State of Mississippi, if it were based upon this Court's construction of the statutory provisions prior to the passage of the 1956 amendment of section 26. Up until that time it had been the absolute policy of the State of Mississippi that contracts for the future delivery of commodities were unenforceable unless the parties intended actual delivery in kind. This Court has held, and properly so, that the language of all previous statutes was insufficient for this Court to have held that the legislature had intended to change the law which had been laid down under our statutes and by the decisions of this Court since the beginning of our statehood. See: Clay v. T. H. Allen & Co., 63 Miss. 426 (1886); Isaacs v. Silverberg, 87 Miss. 185, 39 So. 420 (1905); Ascher & Baxter v. Edward Moyse & Co., 101 Miss. 36, 57 So. 299 (1911); Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933); Laird, Bissell & Meeds v. Capps, 224 Miss. 361, 80 So.2d 49 (1955).

However, the statute as amended in 1956, Mississippi Code Annotated section 26 (1956), is a clear departure from the former policy in that it abolishes the need for intent of actual delivery under certain conditions. The statute reads as follows:

> All contracts of sale for future delivery of cotton, grain, stock, or other commodities (1) made in accordance with the rules of any board of trade, exchange or similar institution where such contracts of sale are executed; and (2) actually executed on the floor of such board of trade, exchange or similar institutions and performed or discharged according to the rules thereof; and (3) when such contracts of sale are made with or through a regular member in good standing

of a cotton exchange, grain exchange or similar institution organized under the laws of the State of Mississippi or any other state shall be, and they are hereby declared to be, valid and enforceable in the courts of this state according to their terms, provided, that contracts of sale for future delivery of cotton in order to be valid and enforceable as provided herein must not only conform to the requirements of clauses (1), (2) and (3), but must also be made subject to the provisions of the United States Internal Revenue Code of 1954, subchapter D; provided, further, that if this clause should for any reason be held inoperative then contracts for the future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses (1), (2) and (3) of this section; provided, further, that if contracts of sale for future delivery of cotton, grain, stock, or other commodity shall conform to all of the requirements set forth above in this section, then the same shall be valid and enforceable in all the courts of this state, notwithstanding that at the time of execution of such contracts that either or both of the parties thereto did not contemplate or intend that the same should be consummated by the actual delivery and receipt of the commodity specified. *The plain intent of this section,* while declaring unlawful all transactions conducted in and through a "bucket shop" as hereinafter defined, *is to make lawful and enforceable and to withdraw from the provisions of the gaming and wagering laws, all transactions executed upon and in accordance with the rules of a legitimate cotton, grain, stock or other commodity exchange or board of trade whether the intent of delivery of the actual commodity was present or not and this article shall be liberally construed at all times so as to effectuate this purpose.* (Emphasis added.)

This Court has repeatedly held that it is solely within the province of the legislature to determine the state's public policy. In the case of Durham v. Durham, 227 Miss. 76, 84-85, 85 So.2d 807, 809 (1956), we note the following statement:

> We fully recognize that matters of public policy are for the legislature to declare when it has acted, and it is not for the courts to question the wisdom of any constitutional declaration of public policy by the legislative body.

See also Golding v. Armstrong, 231 Miss. 889, 97 So.2d 379 (1957).

We hold that the above section 26 is not in violation of the public policy of the State of Mississippi since it is solely within the province of the legislature to determine public policy.

Finally, we reach the question of whether or not section 26 is an unconstitutional delegation of legislative power.

The trial judge made the following statement in his opinion:

> The Court is of the opinion that the Legislature, by providing that such contracts would be valid when made in accordance with the rules of any Board of Trade, Exchange, or similar institutions, is an unlawful delegation of the powers of the Legislature.

Appellee contends that the legislature has no control over these various exchanges and therefore cannot prevent them from making rules which might be arbitrary, capricious, unreasonable or against our public policy.

It is true that Mississippi cannot regulate any of the exchanges because none are located within her borders. However, these exchanges are subject to regulation by our sister states, wherein said exchanges are located, or the Federal Government, or both. It is apparent that the legislature intended to legalize certain "futures contracts" and it felt that transactions executed on an exchange were subject to certain regulation. It manifested its approval of these transactions and the methods of regulation. The

legislature had an opportunity to examine the rules and procedures of the various exchanges and the extent of regulation, and it could have exempted, and can exempt in the future, any exchange which it feels is not being properly regulated or has adopted arbitrary rules. We hold that the legislature did not make an unlawful delegation of legislative process by simply providing that contracts made on exchanges, which it evidently feels are being properly regulated, are enforceable. As previously stated, the legislature, having the constitutional right, could have withdrawn, and can in the future withdraw, approval of any exchange that, in its judgment, is not being properly regulated.

Appellee contends that section 26 is class legislation, and violates due process of law in that the legislature has made an arbitrary distinction between brokerage houses in this state which have connections with an exchange, and those which do not. We do not agree for the reason that any brokerage house that can qualify may obtain the benefits which the legislature has seen fit to grant. In other words, any person or firm interested in dealing in commodities' futures may do so by complying with the legislative intent and requirements. In a proper case we could be concerned with the problems and practicalities of fulfilling the requirements of a statute, but we find no necessity for concern in this case. We hold that the legislature had the power to make the classification in this case. As was stated in State v. Land, 231 Miss. 529, 562-63, 95 So.2d 764, 778 (1957):

> The question of classification is primarily for the Legislature. It does not become a judicial question except for the purpose of determining whether it is clearly unreasonable. Great liberality has always been indulged in the matter of classification. It must be looked at from the standpoint of the Legislature enact-

> ing it. Hence there is a presumption in favor of legislative classification, of the reasonableness and fairness of legislative action, and of legitimate grounds of distinction. . . .

We think that the reasonableness of the classification in section 26 between transactions consummated on an exchange, and "bucket shop" transactions, is so obvious that it warrants no discussion.

Appellee contends that the method of handling purchases and sales on the New York Coffee and Sugar Exchange when the market is "down the limit" amounts to a lottery in violation of this state's gambling laws. However, the court must assume that the legislature was familiar with the rules and procedures of the various exchanges and approved of them. The transactions in this case were made "in accordance with the rules of" and were "actually executed on the floor" of an "exchange," as provided by section 26. Since section 26 further provides that such transactions are withdrawn "from the provisions of the gaming and wagering laws," appellee's contention is without merit.

As is true in many cases, we are unable here to arbitrarily set at rest the sundry issues and implications which are ably urged in briefs of counsel. Insofar as the basic issues presented in this case are concerned, we are led to the inescapable conclusion that the legislature properly exercised its prerogative and the constitutional rights of the litigants here have not been violated. Therefore, we are forced to reverse the portion of the judgment of the lower court wherein it was held that section 26 is violative of the State's public policy and that it is an unconstitutional delegation of legislative process, and to enter judgment here for the appellant in the amount claimed. In all other respects the judgment is affirmed.

AFFIRMED IN PART AND REVERSED IN PART, AND JUDGMENT ENTERED FOR APPELLANT.

RODGERS, JONES, PATTERSON AND INZER, JJ., CONCUR.

APPENDIX "C-1"

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, MAY 23, 1966, Court Sitting

Kohlmeyer & Company

#43,963 v.

Abe A. Rotwein

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 15th day of September 1964—be and the same is reversed as to that portion of the judgment wherein the court held that Section 26, Code 1942 is violative of the State's public policy and that it is an unconstitutional delegation of legislative process and judgment is entered here for the appellant in the amount claimed; in all other respects the cause is affirmed. It is therefore ordered and adjudged that the appellant, Kohlmeyer & Company, do have and recover of and from the appellee, Abe A. Rotwein, the sum of $6,975.75 with interest at the rate of 6 per centum per annum from the date of the judgment in the Court below until paid, and all of the costs in this Court and in the Court below to be taxed, for which let proper process issue.

MINUTE BOOK "BN" Page 581

APPENDIX "C-2"

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, JUNE 13, 1966, Court Sitting

Kohlmeyer & Company

v. #43,963

Abe A. Rotwein

This cause this day came on to be heard on the motion to correct judgment filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be sustained doth order and adjudge that said motion be and the same is hereby sustained, and the judgment of this Court rendered and entered in this cause on May 23, 1966 is hereby corrected and amended so as to provide interest at the rate of 6 per centum per annum on the sum of $6,975.75 from June 7, 1963 until paid instead of from September 15, 1964, the date of the judgment in the Court below. It is so ordered.

MINUTE BOOK "BN" Page 599

APPENDIX "C-3"

IN THE SUPREME COURT OF MISSISSIPPI

FRIDAY, JULY 8, 1966, Court Sitting

KOHLMEYER & COMPANY

vs. No. 43,963

ABE A. ROTWEIN

This cause this day came on to be heard on the suggestion of error and motion for consideration of additional authorities filed herein and this Court having sufficiently examined and considered the same and being of the opin-

ion that the same should be overruled doth order and adjudge that said suggestion of error and motion for consideration of additional authorities be and the same are hereby overruled.

MINUTE BOOK "BN", PAGE 607

STATE OF MISSISSIPPI
HINDS COUNTY

KOHLMEYER & COMPANY

vs. No. 43,963

ABE A. ROTWEIN

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing are true and correct copies of: Judgment rendered 5/23/66, Minute Book "BN", Page 581; Motion to Correct Judgment rendered 6/13/66, Minute Book "BN", Page 599 and Order Overruling Suggestion of Error and Motion for Consideration of Additional Authorities rendered 7/8/66, Minute Book "BN", Page 607, these judgments being rendered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 23rd day of September A. D., 1966.

/s/ Julia H. Kendrick,
Mrs. Julia H. Kendrick,
Supreme Court Clerk

(Seal)

APPENDIX "D"

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

KOHLMEYER & COMPANY,
Plaintiff,

vs.

ABE A. ROTWEIN,
Defendant.

No. 16,944

Judgment

This case came on for trial, without a jury, on the Plaintiff's Declaration and the Defendant's Answer and Cross-claim. The parties were present, the Plaintiff, Kohlmeyer & Company, being represented by Brunini, Everett, Grantham & Quin of Jackson, Mississippi and Lemle & Kelleher of New Orleans, Louisiana, and the Defendant, Abe A. Rotwein, being represented by himself and Ralph L. Landrum of Jackson, Mississippi.

At the conclusion of the trial, the Court took the case under advisement, pending submission of briefs by the respective parties.

The Court, after having had before it the testimony of witnesses, exhibits, argument of counsel and briefs of counsel, finds that Section 26 of the Mississippi Code of 1942, as amended, is unconstitutional and provides for an unlawful delegation of the powers of the legislature and is in violation of the long established public policy in the State of Mississippi against gambling and that any contracts made thereunder are unenforceable.

The Court further finds that the Plaintiff and Cross-Defendant violated no breach of trust or fiduciary relationship which may have existed between the parties.

The Court further finds that this case was continued from the July, 1964 Term of Court to the September, 1964 Term of Court, pending the rendering of a written opinion of this Court, which was made.

Therefore, the Judgment of this Court is that the Plaintiff recover nothing from the Defendant; and that the Defendant recover nothing from the Plaintiff; and that the Plaintiff, Kohlmeyer & Company, be required to pay all costs of Court taxed in this case, for all of which let execution issue.

SO ORDERED, this the 15th day of September, 1964.

/s/ Russel D. Moore
Circuit Court Judge

APPROVED AS TO FORM:

Counsel for Plaintiff
By /s/ John W. Grower

Counsel for Defendant
By /s/ A. A. Rotwein

APPENDIX "E"

Title 28, United States Code:

Section 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, our commission held or authority exercised under, the United States."

Section 2101(c):

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

APPENDIX "F"

United States Constitution:

(a) The Commerce Clause, Article I, Section 8, Cl. 3:

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

(b) The Full Faith and Credit Clause, Article IV, Section I:

"Full Faith and Credit shall be given to each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

(c) The Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(d) The Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "G"

Mississippi Constitution and Statutes:

(a) Section 33, *Mississippi Constitution*:

"The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives."

(b) Section 26, *Recompiled Mississippi Code of 1942*:

"All contracts of sale for future delivery of cotton, grain, stock, or other commodities (1) made in accordance with the rules of any board of trade, exchange

or similar institution where such contracts of sale are executed; and (2) actually executed on the floor of such board of trade, exchange or similar institutions and performed or discharged according to the rules thereof; and (3) when such contracts of sale are made with or through a regular member in good standing of a cotton exchange, grain exchange or similar institution organized under the laws of the State of Mississippi or any other state shall be, and they are hereby declared to be, valid and enforceable in the courts of this state according to their terms, provided, that contracts of sale for future delivery of cotton in order to be valid and enforceable as provided herein must not only conform to the requirements of clauses (1), (2) and (3), but must also be made subject to the provisions of the United States Internal Revenue Code of 1954, subchapter D; provided, further, that if this clause should for any reason be held inoperative then contracts for the future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses (1), (2) and (3) of this section; provided, further, that if contracts of sale for future delivery of cotton, grain, stock, or other commodity shall conform to all of the requirements set forth above in this section, then the same shall be valid and enforceable in all the courts of this state, notwithstanding that at the time of execution of such contracts that either or both of the parties thereto did not contemplate or intend that the same should be consummated by the actual delivery and receipt of the commodity specified. The plain intent of this section, while declaring unlawful all transactions conducted in and through a 'bucket shop' as hereinafter defined, is to make lawful and enforceable and to withdraw from the provisions of the gaming and wagering laws, all transactions executed upon and in accordance with the rules of a legitimate cotton, grain, stock or other commodity exchange or board of trade whether the intent of delivery of the actual commodity was present or not and this article shall be liberally construed at all times so as to effectuate this purpose."

APPENDIX "H"

McKinney's Consolidated Laws of New York, Annotated, Penal Law:

(a) As to gambling, Sections 991 and 992:

"All wagers, bets or stakes, made to depend on any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

"All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void."

(b) As to lotteries, Sections 1370 through 1386.

APPENDIX "I"

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KOHLMEYER & COMPANY,
Appellant,
vs.
ABE A. ROTWEIN,
Appellee.
No. 43,963

Motion for Consideration of Additional Authorities

Having been recently retained in the above entitled cause after the delivery of the opinion by Mr. Justice Brady, and, being familiar with certain Federal authorities believed to be controlling as to the opinion of the Court, we respectfully move that the Court permit the same to be called to its attention as is done by the annexed Memorandum.

No questions heretofore raised are waived but our sole purpose is to supplement by controlling decisions.

Respectfully submitted,

Garner W. Green
Green, Green and Cheney
800 Electric Building
Jackson, Mississippi
Of Counsel for Appellee

I, Garner W. Green, of counsel for Appellee, hereby certify that I have this day mailed a true and correct copy of the foregoing, postage prepaid, to Lemle & Kelleher, National Bank of Commerce Building, New Orleans, Louisiana; and Brunini, Everett, Grantham & Quin, First National Bank Building, Jackson, Mississippi, attorneys for Appellant, this the ___ day of ___, 1966; and to Wells, Thomas & Wells, Lamar Life Building, Jackson, Mississippi, attorneys for Amicus Curiae.

Garner W. Green

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KOHLMEYER & COMPANY,
Appellant,
vs.
ABE A. ROTWEIN,
Appellee.

No. 43,963

Memorandum

As stated in the opinion by Mr. Justice Brady, the facts are not in dispute. There was no intention upon the part of either party to make a delivery. The Court made applicable thereasto the laws of the State of Mississippi, Section 26, *Recompiled Mississippi Code of 1942*, as

amended. With deference, there was a contravention of the constitutional rights of the Appellee.

In the contract, Exhibit "A" to the Bill of Complaint, it is specifically provided:

> "8. This agreement shall be irrevocable as long as the undersigned shall have any account with you; it shall be binding upon the undersigned and upon the undersigned's executors, administrators, heirs and assigns; it can be amended only in writing duly signed by the undersigned and a member of your firm; its construction and enforcement shall be governed by the laws of the State of New York."

The laws of the State of Mississippi were assumed by this Court to control, the statutes and decisions of New York to the contrary, being embraced in the Suggestion of Error and elsewhere. There is a controlling decision thereasto, namely: *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1178, wherein a Tennessee contract was sought to be controlled by a Mississippi statute and there was held to be contrariety. The Tennessee law was made controlling as admeasuring the rights of the parties. Compare also *Lienkauf Banking Co.* v. *Haney*, 93 Miss. 613, 46 So. 626.

The laws of the State of New York, with deference, admeasure the constitutional rights of the parties and not those of Mississippi. The laws of the State of New York will be applied on certiorari by the Supreme Court of the United States. Compare *Aldrich* v. *Aldrich*, 378 U.S. 540, 12 L.ed. 2d 1020. To the end that the laws of the State of New York may be made operative instead of those of Mississippi, reversal thereasto is asked under this controlling authority.

This Court, as to Federal questions, is an intermediate court. *Louisville & N.R. Co. v. State*, 107 Miss. 597, 65 So. 881.

Respectfully submitted,

Garner W. Green
Green, Green and Cheney
800 Electric Building
Jackson, Mississippi
Of Counsel for Appellee

I, Garner W. Green, of counsel for Appellee, hereby certify that I have this day mailed a true and correct copy of the foregoing, postage prepaid, to Lemle & Kelleher, National Bank of Commerce Building, New Orleans, Louisiana, and Brunini, Everett, Grantham & Quin, First National Bank Building, Jackson, Mississippi, attorneys for Appellant, this the ___ day of _____, 1966; and to Wells, Thomas & Wells, Lamar Life Building, Jackson, Mississippi, attorneys for Amicus Curiae.

Garner W. Green